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In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, CLARENCE G. MORSE, MARITIME ADMINISTRATOR AND FREDERICK H. MUELLER, SECRETARY OF COMMERCE, PETITIONERS

v.

PACIFIC FAR EAST LINE, INC., MATSON NAVIGATION COMPANY, AND UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Federal Maritime Board, et al., respectfully pray that a *writ of certiorari* issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter the Court of Appeals) dated February 4, 1959, vacating an order entered November 26, 1958 by the United States District Court for the District of Columbia (hereinafter the District Court), and remanding the case for further proceedings before the Federal Maritime Board limited to a specified issue.[1]

[1] A certified copy of the record in the Court below has been filed with the Clerk of this Court.

The filing of this petition has been authorized by the Solicitor General, whose letter of authorization has been filed with the Clerk of the Court.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals, reprinted in Appendix B, was entered on February 4, 1960 (R. 674). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (62 Stat. 928).

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to review an order of the Federal Maritime Board and Maritime Administration (hereinafter referrred to collectively as "the Board") denying to Pacific Far East Line (PFEL), a carrier operating in foreign trade under a subsidy contract awarded by the Board, permission under Section 805(a), Merchant Marine Act, 1936 (the Act), to institute an unsubsidized steamship service in domestic trade between California and Hawaii.

2. Whether the Court of Appeals erred in striking down a determination by the Board that award of permission under Section 805(a) for PFEL to institute an unsubsidized steamship service in the domestic trade between California and Hawaii, would result in "unfair competition" to the exclusively domestic California/Hawaii service of Matson Navigation Company (Matson).

3. Whether the Court of Appeals erred in holding that the Board's finding that PFEL's entry into the trade would be "prejudicial to the objects and policy

of the Act" was not properly supported by reasons shown in the Board's report.

STATUTES INVOLVED

The pertinent provisions of the Merchant Marine Act, 1936, as amended (46 U.S.C., 1101 *et seq.*), and of the Administrative Procedure Act (5 U.S.C., 1001 *et seq.*), are set forth as Appendix C hereto.

STATEMENT OF CASE

A. STATUTORY BACKGROUND

This is a suit originally brought by PFEL, seeking judicial review of a determination of the Board under Section 805(a) of the Act.

PFEL is a subsidized steamship line, operating pursuant to an operating-differential subsidy agreement with the Board in which PFEL assumes certain obligations as to its method of operation and, in consideration thereof, the Board undertakes to pay it a subsidy.

Since this case turns, in part, upon the legislative setting of the subsidy program, we here summarize the relevant statutory provisions:

The Merchant Marine Act, 1936 embodies a broad, comprehensive scheme for the development and maintenanee of an adequate and well-balanced American merchant marine largely through the payment of subsidies.[2] The Board is responsible for administration of the Act, and in that connection is vested with broad discretion and powers.

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[2] The national maritime policy is set forth in Title I of the Act, reprinted in Appendix C.

Title VI of the Act empowers the Board to award operating subsidies based on the difference between the cost of operating similar foreign-flag and American-flag vessels, thus enabling American flag ships to operate in competition with foreign-flag ships. The same objective underlies the program of construction subsidy set out in Title V of the Act.

The success of the United States in maintaining a merchant marine, built and operated under the highest costs in the world, is largely attributable to the subsidy program. As a result, the United States is one of the foremost maritime nations in the world, with a large merchant fleet available to serve the needs of the nation's commerce and to assist in its defense.

The subsidy program is confined to U.S. flag ships employed in the foreign commerce of the United States because U.S. flag ships operating in the domestic coastwise trades do not encounter the competition of foreign-flag ships, which are excluded by law from the domestic or coastwise commerce of the United States. 46 U.S.C. 1156, 1175(a). The basic philosophy of the operating subsidy program is implemented by Section 805(a) of the Act (46 U.S.C. 1223a),[3] directly involved here. Under Section 805(a) no subsidized line may directly or indirectly invade any domestic trade, unless the Board first gives written permission, and that permission *shall not* be granted (except to operators qualifying under the so-called "grandfather" proviso not here applicable) where the result would be (1) unfair competition to any wholly

[3] Section 805(a) is reprinted in Appendix C.

domestic service; or (2) prejudice to the over-all objects and policy of the Act.

B. FACTUAL BACKGROUND

PFEL operates a subsidized steamship service in foreign commerce between California ports and ports in the Far East, on what has been designated as Essential Foreign Trade Route No. 29 by the Maritime Administrator pursuant to Section 211(a) of the Act, 46 U.S.C. 1121(a).

By Article II–15 of its subsidy contract, PFEL (like all subsidized carriers) expressly surrendered the right to operate directly or indirectly in domestic commerce unless first given written permission by the Board to do so, as provided for in Section 805(a) (R. 574–8).

PFEL filed an application dated December 15, 1955, which, in part, requested written permission under Section 805(a) to inaugurate a domestic cargo service between ports on the Pacific coast of the United States and those in Hawaii, the service to be conducted with unsubsidized cargo vessels in transit between the Pacific Coast and Guam.

The application was opposed by certain other carriers operating in the Pacific Coast/Hawaii trade, chiefly Matson Navigation Company. Matson, in addition to other services to and from Hawaii, conducts an exclusively domestic service between California and Hawaii—that is, its California/Hawaii ships do not at any time call at any foreign ports.

The Board ordered a hearing on PFEL's application under Section 805(a). Hearings were held be-

fore an Examiner of the Board at San Francisco, Honolulu, and Washington, D.C. The record includes 7,561 pages of testimony and 177 exhibits.[4]

The Examiner, in a recommended decision served December 19, 1956 (R. 22–35), concluded that:

1. The California/Hawaii freight service of Matson "is operated exclusively in the coastwise service, and, under Section 805(a), is entitled to protection from unfair competition";

2. The "Board should find that the granting of PFEL's application will not result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service"; and

3. The "Board should find that the granting of PFEL's application will not * * * be prejudicial to the objects and policy of the Act."

Exceptions were filed to the Examiner's decision and thereafter the Board heard oral argument. In a report (R. 1–21) served May 14, 1957, one member dissenting, the Board denied PFEL's application on the following grounds:

1. Matson is an exclusively domestic operator in the California/Hawaii trade;

2. Matson's exclusively domestic service needs the available cargo in this trade, has the capacity to carry such cargo and, as opposed to PFEL (which is pri-

[4] Part of this record covers the Section 805(a) application of American President Lines, Ltd., which was consolidated for hearing with PFEL's application. The APL application was withdrawn after the hearing ended.

marily a subsidized offshore operator), is fundamentally entitled to such cargo;

3. The diversion of the volume of cargo which PFEL would carry would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service;

4. To permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson's exclusively domestic California/Hawaii service; and

5. To permit PFEL to carry cargo in the California/Hawaii trade would be prejudicial to the objects and policy of the Act.

PFEL filed a petition for reconsideration which was denied by the Board on July 30, 1957. It also filed simultaneously (1) a petition with the Court of Appeals for review under the Review Act of 1950 (5 U.S.C. 1031, *et seq.*) which was dismissed for lack of jurisdiction, *Pacific Far East Line, Inc.* v. *United States and Federal Maritime Board,* 225 F. 2d 182 (1958), and (2) a suit in the United States District Court for the District of Columbia as described below.

C. THE PRESENT ACTION

PFEL requested the District Court (Civil Action No. 1708–57) to set aside the Board's report; to find that the Board erred in its determination; and to remand the case to the Board for further proceedings (R. 664). The Department of Justice, not previously a participant in the case, intervened as a plaintiff (R. 659–60). Matson intervened as a de-

fendant (R. 651–2). PFEL moved for summary judgment (J.A. 28–29). The Board and Matson moved for dismissal of the complaints of PFEL and the Department of Justice or in the alternative, for summary judgment against the plaintiffs (R. 665–7).

On November 26, 1958, after hearing full oral argument, the District Court denied PFEL's motion, and granted the motions of the Board and Matson for summary judgment, without opinion and without indicating whether it rested its order on jurisdictional grounds or on the merits (R. 669–70).[5]

PFEL and the Department of Justice each appealed to the Court of Appeals to reverse the order of the District Court. These appeals were docketed as Nos. 15,085 and 15,086, respectively. In a judgment dated February 4, 1960, the Court of Appeals ruled that the District Court had jurisdiction to review the Board's order and that the Board erred in finding that PFEL's entry into the trade would result in "unfair competition" to an exclusively domestic service. The Court of Appeals vacated the judgment of the District Court, and ordered the case "remanded for further proceedings by the Board limited to the question whether PFEL's entry into the trade would be 'prejudicial to the objects and policy of the Act.'" The Board now asks the Supreme Court to review the judgment of the Court of Appeals dated February 4, 1960.

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[5] The Board moved for summary judgment on the ground that the court lacked jurisdiction, as well as on grounds relating to the merits.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals should be reviewed because: (1) It erroneously holds that a steamship line operating under a subsidy contract may secure court review of a discretionary action taken by the Board in administering conditions attached to the subsidy program and incorporated in the line's subsidy contract; (2) it rejects criteria hitherto consistently followed by the Board governing the entry of subsidized steamship operators into the coastwise and intercoastal trades including trades to and from Alaska, Hawaii, and Puerto Rico, whose economies are heavily dependent upon regular steamship service; and (3) it is based upon an erroneous construction of the standards of Section 805(a) of the Act.

The issues decided by the Court of Appeals are of wide importance, affecting and altering basically the status of carriers serving the non-contiguous states and possessions of the United States. Moreover, the decision of the Court of Appeals throws open to judicial review for the first time action which is committed to agency discretion.

1. THE PUBLIC IMPORTANCE OF THE ISSUE OF REVIEWABILITY OF THE BOARD DECISION

The decision of the Court of Appeals erroneously affords the holder of a subsidy contract (or, indeed, an applicant therefor) the right to judicial review of a fundamental condition attached to the award of subsidy. The decision holds that because "The Mer-

chant Marine Act does not preclude judicial review and does not commit the Board's action to the Board's discretion", a steamship line operating under a subsidy contract may seek court review of the Board's discretionary refusal to waive an obligation voluntarily assumed when it obtained subsidy. Although its decision recognized that the propriety of judicial review depends upon "the nature of the . . . determination", the Court of Appeals gave no weight to this principle. It ignored the fact that by its nature the determination in question called for the exercise of discretion and specialized knowledge in maintaining that division between domestic unsubsidized shipping services and foreign subsidized services, which is so essential to the overall, balanced shipping program the Board must administer. The Board accordingly submits that the Act does preclude judicial review of Board refusal to grant permission under Section 805(a) and does commit this determination to agency discretion.

The Court of Appeals, moreover, did not comment upon the issue of PFEL's standing to seek court review. Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) limits the right of review to persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute . . . ."

These limitations apply to this case. PFEL has suffered no legal wrong by reason of the Board's refusal to waive a restriction against entry into the domestic trade, provided for by statute and freely

assumed by PFEL when it entered into a subsidy contract. PFEL can point to no "legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded upon a statute which confers a privilege," which the law requires as a basis for standing to sue. *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137–139 (1939). See also *Perkins* v. *Lukens Steel Co.*, 310 U.S. 313 (1940); *Alabama Power Co.* v. *Ickes;* 302 U.S. 464 (1938); *Isbrandtsen Company* v. *Federal Maritime Board,* 159 F. Supp. 884, 886–887 (D.C.D.C. 1958); *American President Lines* v. *Federal Maritime Board,* 112 F. Supp. 346 (D.C.D.C. 1953).

Nor is PFEL a party "adversely affected or aggrieved by such action within the meaning of any relevant statute." This phrase relates only to cases brought under statutes expressly enabling "aggrieved" persons to seek review. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 932 (D.C. Cir. 1955).[6] Neither in the Merchant Marine Act, 1936, nor elsewhere is there any statutory provision opening the courts to persons "aggrieved" by a Board decision under that Act. The reasons for this are obvious from the very nature and purposes of the Act.

It is submitted that the issues relating to the reviewability of the agency determination are of major importance in the field of federal administrative law and

[6] The *Kansas City* case specifically overruled the holding in the *American President Lines* case that Section 10 of the Administrative Procedure Act imported the "adversely affected or aggrieved" provision for judicial review into Section 605(c) of the Merchant Marine Act, 1936 (see 225 F. 2d at page 932).

warrant this Court's review. As will be shown, additionally, the issues on the merits of this case are of equal or greater public importance.

2. THE PUBLIC IMPORTANCE OF LIMITATIONS ON THE ENTRY OF SUBSIDIZED LINES INTO THE COASTWISE OR INTERCOASTAL TRADES.

The decision of the Court of Appeals warrants review for the additional reason that it changes radically the criteria governing the entry of subsidized steamship lines into the coastwise and intercoastal trades. These trades are generally depressed, and it is essential that lines serving them continue to be afforded the protection of Section 805(a) as that section has been interpreted in the past by the Board. The deep water dry-cargo vessels serving the domestic trades constitute the fleet most directly available to the Government in a national emergency for defense transportation purposes, and the maintenance and replacement of this fleet, therefore, is important to the national defense.[7] Furthermore, a strong domestic fleet is important (a) to our off-shore states and territories which must rely almost exclusively on such services for the freighting of the imports and exports which are vital to their economies, and (b) to the commerce between ports in the United States where water service furnishes a competitive alternative to overland modes of transportation.

Many of the domestic steamship services have disappeared since the end of World War II and most

[7] A Review of Maritime Subsidy Policy in the Light of Present National Requirements for a Merchant Marine and a Shipbuilding Industry, printed for use of Committee on Merchant Marine and Fisheries, 83 Cong. (1954).

of those remaining are in financial straits. The Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce is currently holding hearings in an attempt to find a solution to this problem.[8] In exercising its specialized judgment in the field, the Board has consistently applied Section 805(a) of the Act in a manner that protects the domestic services from the competition of subsidized carriers. Under the decision of the Court of Appeals, this protection will be seriously impaired and the plight of the domestic services correspondingly worsened. It is true that the domestic service directly involved here, Matson's California/Hawaii service, is in reasonably sound financial condition. However, that in part is due to the very Board position which the Court of Appeals has rejected, and it begs the problem to suggest that Matson's domestic service might somehow withstand the invasion of a subsidized carrier. And quite beyond its immediate effect on the Hawaii trade, the adverse impact of the Court of Appeals' decision extends equally to all the other domestic trades and services which are in a distressed state.[9]

The protection afforded by section 805(a) assumes further importance in light of the fact that Congress

[8] See press releases dated January 27, and March 18, 1960, from the Senate Committee on Interstate and Foreign Commerce, announcing that the Subcommittee on Merchant Marine and Fisheries will hold a series of hearings "on the decline of America's coastwise and intercoastal steamship industry."

[9] Section 805(a) is applicable to both the off-shore domestic services and the services between ports on the United States mainland.

has erected no licensing or certification requirement to limit entry by common carriers by water into the domestic offshore trades, as contrasted with the domestic contiguous trades.[10] Consequently, any United States citizen may inaugurate service in the domestic offshore trades with United States flag vessels, even if the trade is overtonnaged and the new service is not convenient or necessary in the public interest. Only with respect to subsidized lines has Congress established any prerequisite to free entry into the domestic offshore trades, and in doing so has said in effect that subsidized operators in foreign commerce have no business in the domestic trade except where there is a clear service need over and above the service furnished by the domestic carriers. The prerequisites set forth in section 805(a) are thus necessary to prevent incursions by subsidized lines into domestic trades where the existing domestic service is adequate.

The principle that Section 805(a) warrants permission only where the exclusively domestic services are inadequate has been consistently applied by the Board whenever subsidized lines have sought to enter into the domestic trades. American President Lines was refused permission to institute westbound intercoastal non-refrigerated service. *American President Lines, Ltd.—Unsubsidized Operation, Route 17*, 3

[10] 46 U.S.C. 902 (i), (j), and (k) limits the applicability of Title III of the Interstate Commerce Act to transportation between states; and the Hawaii Statehood Act (Act of March 18, 1959, 73 Stat. 4) and Alaska Statehood Act (Act of July 7, 1958, 72 Stat. 339) continue the *status quo* with regard to water transportation to and from the mainland.

F.M.B. 457 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 488 (1954). Pacific Far East Lines was refused permission to serve the California/Hawaii trade in the case here under review. Isbrandtsen Company, Inc., was refused permission to carry (1) general cargo from California to Atlantic Coast ports north of Baltimore, and from Puerto Rico to North Atlantic ports; (2) lumber and woodpulp in the eastbound intercoastal trade; and (3) bulk cargo between Gulf of Mexico and North Atlantic ports. *Isbrandtsen Company, Inc.—Subsidy, E/B Round-the-World*, 5 F.M.B. 448 (1958). T. J. McCarthy Steamship Company was refused permission to carry bulk cargo between United States ports on the Great Lakes, *T. J. McCarthy—Application for Section 805(a) Permission*, mult. op. dated December 4, 1959. These cases stand as examples of a consistent line of approach by the Board in its treatment of applications under Section 805(a).

The devitalized Section 805(a) standards which the decision of the Court of Appeals imposes upon the Board would plainly jeopardize the domestic services and could make it necessary for the Board to permit applicants for Section 805(a) permission, such as those mentioned above, to enter the trades in question notwithstanding the Board's findings that the existing domestic services are adequate. Moreover, relaxation of the standards of Section 805(a) may be expected to encourage many additional subsidized operators to seek to invade the domestic trades. Thus, the decision of the Court of Appeals is likely to have a disruptive effect upon all of the domestic trades and to

discourage the lines currently dedicated to these trades from attempting to continue in them. This would be detrimental both to the national defense and to the maintenance of stable and dependable common carrier water services to the areas involved. It is, therefore, of utmost public importance that the Court of Appeals' decision be reviewed on the merits by the Supreme Court.

3. THE COURT OF APPEALS MISCONSTRUED SECTION 805(A) OF THE ACT

Section 805(a), which is reproduced in full in Appendix C, provides that the Board "shall not grant" permission for a subsidized line, or a line related thereto, to serve any domestic trade if the Board finds it—

> (1) "will result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service", or
>
> (2) "would be prejudicial to the objects and policy of this Act".

A proviso to the section states that if such line "or a predecessor in interest was in bona-fide operation * * * in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time", the Board "shall grant such permission without requiring further proof that the public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade."

Section 805(a) further provides that:

> "If such application be allowed, it shall be unlawful * * * to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

The Board has read meaning into the broad statutory standards of Section 805(a) as follows:

1. Where the application is for entry into a trade being served by an exclusively domestic service, permission has been denied, without more, if the exclusively domestic service is adequate for the trade and such service needs the available cargo.

2. Where an exclusively domestic line is not adequately serving the trade, the application is weighed in terms of its effect upon all of the objects and policies of the Act. Included in the balancing of the objects and policies of the Act is any detriment which may result to a line historically and primarily engaged, although not exclusively, as a carrier in the domestic trade, as well as any detriment which may result to the effective conduct of the subsidized lines' operations in the foreign trade, by reason of its proposed domestic operation.

But as the Court of Appeals has interpreted Section 805(a):

1. The exclusively domestic operator's need for cargo and the adequacy of its service have nothing to do with the question whether "unfair competition"

would result from award of permission under Section 805(a) to a subsidized carrier.

2. The public interest in ending the alleged "monopoly" of any exclusively, or primarily, domestic line serving the trade should be given weight—perhaps controlling weight—under the standard of "objects and policy of the Act," because of "the anti-monopoly policy which Congress has often expressed."

The Court further held that the Board had disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act," and upon remand the Board should clarify this.

The foregoing construction of Section 805(a) by the Court below is plainly erroneous.

A. THE COURT ERRED IN ITS CONSTRUCTION OF UNFAIR COMPETITION

In construing the phrase "unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service" as an adequacy of service test, the Board has given it the only possible meaning that is harmonious with reason and with the rest of the statute. The "unfair competition" clause was intended by Congress to afford the exclusively domestic service a special degree of protection. But as the Court of Appeals has interpreted Section 805(a), this special protection is read out of the statute. The Court would give the phrase "unfair competition" a different and nugatory meaning. Without defining the term, the Court suggests several things that it supposes the term would cover.

It mentions, and apparently approves, the Department of Justice argument that "unfair competition" means the diversion of subsidy moneys into the domestic service. This ignores the fact that such diversion is in any event specifically outlawed by the second paragraph of Section 805(a), which prohibits any direct or indirect diversion into domestic operations of "any moneys, property, or other thing of value used in foreign-trade operations for which a subsidy is paid." Obviously, therefore, "unfair competition" cannot mean protection against diversion, unless one wishes to say that Congress in enacting Section 805(a) engaged in an exercise of confusion and redundancy.

Nor would the exclusively domestic line receive any special protection, as intended by Section 805(a), from any of the other possible meanings suggested by the Court of Appeals. Thus, the Court suggested "fraudulent competition" as a possible meaning; but a moment's reflection shows that there is little protection available to an exclusively domestic service if every subsidized applicant is to be granted permission to invade the domestic trades save only where it can be proven that the applicant will, if granted permission, indulge in "fraudulent competition." The applicant's future engagement in such competition, if not prohibited by law in any case, is at best next to impossible to prove in a prospective hearing such as the one afforded interested parties under Section 805(a). This cannot be a standard of "unfair competition" which would provide meaningful protection to exclusively domestic lines.

The Court also suggests that the use of profits from subsidized operations to bear the losses incurred by fixing non-compensatory rates would be unfair competition. This, as noted above, is a diversion of funds prohibited in any event by the second paragraph of Section 805(a), and thus does not provide a special protection to exclusively domestic lines. And carriers in the domestic offshore trades are in any case required by Section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845(a)), to charge just and reasonable rates, and under this statutory mandate, non-compensatory rates could not be charged for they are, on well-settled precedent, deemed to be unreasonable or unjust. Moreover, payment of substandard wages (also suggested by the Court) is not possible, for no vessel can operate without a union contract, pursuant to which maritime wages are fixed at a high standard. There simply is no such thing as substandard wages—all are standardized by union contract. The use of substandard ships similarly could not be a method of unfair competition, since the use of such ships is prohibited in any event in domestic trade by various statutes administered by the Coast Guard (see 46 U.S.C., Chapters 14 and 15).

Competition "in any way that is unfair according to accepted legal or ethical standards" is again something that is also impossible to prove in a prospective hearing. As a practical matter, no applicant for permission would disclose any such intention; at least, it would not do so deliberately. Manifestly the Board is not required to speculate

whether the applicant will in the future violate any standards of lawful competition. Thus this standard, like the other standards of "unfair competition" suggested by the Court, provides no special protection to the exclusively domestic operator.

The fallacy of the Court of Appeals' position is eloquently demonstrated by its own inability to give logical meaning to the term "unfair competition". The fact is that the Court, on no justification, has effectively torn the "unfair competition" standard of Section 805(a) out of the Merchant Marine Act, contrary to the legislative intent and in disregard of the studied opinion of the specialized agency responsible for administering the Act and the subsidies thereunder. And it has denied the Federal Maritime Board the authority to read meaning into "unfair competition". This constitutes serious error which should be reviewed by the Supreme Court.

4. THE COURT OF APPEALS ERRED IN ITS FINDINGS RELATING TO PREJUDICE TO THE OBJECTS AND POLICY OF THE ACT

The Court of Appeals holds that there is a public interest in ending the alleged monopoly of any exclusively or primarily domestic shipping service and that this should be considered under the standard of "objects and policy of the Act." The question whether an exclusively or primarily domestic service is a "monopoly" is not important under Section 805(a). That section is not a vehicle for fostering competition for its own sake. Rather, its purpose is to maintain

adequate coastwise and intercoastal service and foster the general objectives of the Merchant Marine Act, 1936, by limiting competition between subsidized lines and exclusively domestic lines. If this should happen to result in "monopoly" in a given trade, the Act contemplates it and assuredly does not condemn it. Moreover, it will be recalled that any United States-flag carrier is free to enter the domestic trade so long as it is not a subsidized line or an affiliate thereof. If it is the latter, the Board is bound to withhold its permission if there are exclusively domestic carriers (or even only one such carrier) providing adequate service, or if the grant of permission will prejudice the objects and policy of the Merchant Marine Act.

The Court erroneously implies that adequacy of service and need are not to be considered under Section 805(a). But the legislative history of that section shows that until the final enactment, it was expressly phrased in terms of the "public interest and convenience". Indeed, the "grandfather rights" clause of Section 805(a) stipulates that if the applicant or predecessor in interest has served the trade since 1935, the Board "shall grant such permission without requiring further proof that the public interest and convenience will be served by such operation. * * *" It is obvious that Congress broadened Section 805(a) by substituting "objects and policy of the Act" for "public interest and convenience" and that "objects and policy" of the Act includes "public interest and convenience". Whether the existing carriers provide adequate service is crucial in the determination of the

"public interest and convenience."[10] Thus, the Court of Appeals has erred in demanding that under the standard "objects and policy of the Act", the Board must center its consideration around the public interest in ending a monopoly, rather than around the quite different standard of the public interest and convenience in the maintenance of adequate domestic service by strong domestic services free of new competition from subsidy-related lines.

Thus misconceiving the meaning of the "objects and policy" standard, the Court of Appeals further falls into error in concluding that the Board has disclosed no basis for its finding that PFEL's entry into the trade would be inconsistent with this standard. The Court was in error in remanding the case so that the Board could "make the basis of its action reasonably clear."

We respectfully submit that the Board report adequately supports its finding of "prejudice to the objects and policy of the Act." The Board had no reason to make separate findings of fact in support of its conclusions of "unfair competition" and "prejudice to the objects and policy of the Act", because many of its findings support both conclusions. Obviously, it would be a pointless task in these circumstances to catalogue separately the findings which support each conclusion, and there is no such legal requirement. The legal requirement, amply met in

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[10] *American Trucking Associations* v. *United States*, 326 U.S. 77, 836–86 (1945); *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

this case, is that "the report, read as a whole, sufficiently expresses the conclusion of the [agency] based upon supporting data * * *", thereby enabling the courts to perform the limited review function which is theirs. *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 228 (1915); *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U.S. 194, 212 (1944); *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933).

"Prejudice to the objects and policy of [the] Act" is obviously a broad standard which contemplates the weighing by the Board of the benefit as opposed to the detriment found to result from the granting of Section 805(a) permission. It is apparent from the Board's report that it found prejudice to the objects and policy of the Act for the reasons, among others, that the existing Pacific Coast/Hawaii service is adequate, and would be materially harmed by a new service, and that PFEL's competitive impact would jeopardize the vessel replacement program of the exclusively domestic carrier in the trade.

These reasons bear closely on the "objects and policy" test of section 805(a). As to adequacy of service, the express policy of the Act, specifically declared in Sec. 101(46 U.S.C. 1101) is that—

> "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce * * *."

Additionally, as previously shown, the "objects and policy" test necessarily includes consideration of the

public interest and convenience which, in turn, necessarily includes consideration of adequacy of service. The Board's finding of "prejudice to the objects and policy of the Act" is, therefore, supported by its finding that the existing domestic services are adequate.

With respect to the effect of PFEL's proposal on the replacement of Matson's vessels, the facts of record amply support the Board's conclusion that PFEL's entry into the service would jeopardize Matson's ability to replace its vessels and thus to maintain its service. As an insular state, Hawaii is heavily dependent upon suitable steamship service, and it is chiefly Matson that provides, and for decades has provided, this service. The future of this service depends upon Matson's ship replacement program. It is also true that the shipbuilding industry of the United States would be benefited by the replacement of Matson's vessels with new and modern ships, as would the commercial and defense value of the American-flag fleet as a whole. These factors had to be and were properly considered by the Board in determining whether the objects and policy of the Act would be prejudiced by a grant of Section 805(a) permission in this case. Because Matson is furnishing adequate service and a substantial diversion of cargo would adversely affect Matson's operations, including its vessel replacement, and because no benefit to the objects and policy of the Act was apparent, the Board acted properly in denying PFEL's application for permission. The Board's report makes this clear.

CONCLUSION

For the foregoing reasons, this petition for *writ of certiorari* should be granted.

Respectfully submitted.

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WASHINGTON, 25, D.C.
MAY 4, 1960.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

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No. 15085

PACIFIC FAR EAST LINE, INC., APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

No. 15086

UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided February 4, 1960

Mr. Donald E. Van Koughnet for appellant in No. 15085.

Mr. Richard A. Solomon, Attorney, Department of Justice, with whom *Mr. Henry Geller,* Attorney, Department of Justice, was on the brief, for appellant in No. 15086.

Mr. Edward Aptaker, Chief, Regulation Branch, Division of Litigation, Federal Maritime Board, with whom *Messrs. E. Robert Seaver,* General Counsel, Federal Maritime Board, *Robert E. Mitchell,* Assist-

ant General Counsel, Federal Maritime Board and *Edward Schmeltzer,* Attorney, Federal Maritime Board, were on the brief, for appellees Federal Maritime Board, Maritime Administration, Clarence G. Morse, Maritime Administrator, and Frederick H. Mueller, Secretary of Commerce.

Mr. Alvin J. Rockwell, with whom *Mr. Willis R. Deming* was on the brief, for appellee Matson Navigation Company.

Before EDGERTON, WILBUR K. MILLER, AND BASTIAN, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Pacific Far East Line, Inc. (PFEL) asked the District Court to set aside an order of the Federal Maritime Board and the Maritime Administrator (collectively called "the Board") denying PFEL's application for permission to operate unsubsidized vessels between the Pacific Coast and Hawaii.[1] The United States intervened in the District Court as a plaintiff in opposition to the Board's order. Matson Navigation Company (Matson), which had intervened before the Board in opposition to PFEL's application, intervened as a defendant in the District Court in support of the Board's order. These are appeals by the plaintiffs from an order of the District Court granting the defendants' motions for summary judgment.

Appellant PFEL operates a subsidized service between California and the Far East, and an unsubsidized service between California and Guam. Intervenor Matson has operated in the Pacific Coast-Hawaii trade for more than 70 years and is said to

[1] We dismissed for want of jurisdiction a petition for direct review of the Board's order in this court, expressing no opinion as to the District Court's jurisdiction of the present suit. *Pacific Far East Line* v. *United States*, 103 U.S. App. D.C. 104, 255, F. 2d 182, *cert. denied*, 358 U.S. 866.

carry 98% of the cargo in that trade. Matson is not subsidized directly, but operates a subsidized service to Australia through Oceanic Steamship Co., a wholly-owned subsidiary.

Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C. § 1223(a), forbids the payment of a subsidy to any person who, without written permission from the Board, owns or operates vessels "in the domestic intercoastal or coastwise service", which of course includes the California-Hawaii trade that PFEL seeks to enter. Persons interested in an application for such permission are authorized to intervene before the Board, and the Board is required to "give a hearing to the applicant and the intervenors." The Board is not to grant permission if the Board "finds it will result in unfair competition to any person firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter." It is made a misdemeanor for one who has received such permission "to divert, directly or indirectly, any moneys * * * used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations * * *."

After a long hearing, the Board's examiner recommended granting PFEL's application. The Board denied it by a divided vote. The Board found that if the application were granted, PFEL "would be in a position to concentrate primarily on high value commodities, and would, in effect 'skim the cream' in this trade" between the Pacific Coast and Hawaii; that although PFEL's competition might divert less than 10% of Matson's tonnage, "the diversion of Matson revenues may be substantially greater"; that the diversion "would seriously jeopardize Matson's

vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service"; and that the "record fails to show the need for service in excess of that presently provided by Matson and other existing operators". The Board concluded that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act." The Board thinks "a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry," and to which the Board considers them "fundamentally entitled".

Section 10 of the Administrative Procedure Act subjects "every agency action" to judicial review, except so far as "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." 5 U.S.C. 1009. The Merchant Marine Act does not preclude judicial review and does not commit the Board's action to the Board's discretion. Administrative action that requires a hearing and turns on the meaning and application of statutory language is usually subject to judicial review. As in *Shields* v. *Utah-Idaho Central R. Co.*, 305 U.S. 177, 183, "The nature of the determination points to the propriety of judicial review." Nothing in the legislative history indicates a contrary intention. Accordingly the District Court had jurisdiction of this suit.

The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade. As the examiner said, "Matson's witness admitted that

the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy." The Board did not find and the record does not show that PFEL would compete fraudulently; or that it would engage in cutthroat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying sub-standard wages, or by using sub-standard ships, or otherwise; or that it would compete in any way that is unfair according to accepted legal or ethical standards. The Department of Justice, on behalf of the United States, urges that competition is not "unfair" within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did intend to prevent that sort of competition. We need not consider whether it intended to prevent some other sorts as well. We think Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL.

The Board practically equated unfair competition with effective competition. But what is bad for Matson is not necessarily bad for the country. However adequate Matson's service may be, and in whatever sense Matson may "need" to retain its monopoly of the California-Hawaii trade, we cannot accept the Board's view that Matson is "fundamentally entitled" to retain this monopoly as against a competitor that is subsidized—as Matson itself is, through its subsidiary Oceanic—in a different trade. Service and need would be important if the Board were a public utility commission passing upon an application to enter a regulated field, but have nothing to do with the question whether PFEL's competition with Matson would be "unfair".

The Board has disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act." Preservation of Matson's monopoly is not an object or policy of the Act. On the contrary, the public interest in ending this monopoly should be considered. The Act does not exempt the California-Hawaii trade from the anti-monopoly policy which Congress has often expressed.

The appellants do not ask that we reverse the Board's finding with regard to "objects and policy", but only that the case be remanded to the Board so that it may reconsider this finding and clarify it if it is retained. We are adopting this suggestion. The Board should, at least, "make the basis of its action reasonably clear. We cannot find that it did so here." *Radio Station KFH Co.* v. *Federal Communications Commission,* 101 U.S. App. D.C. 164, 166, 247, F. 2d 570, 572. " 'Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. * * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' " *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 654.

The judgment is vacated, and the case is ordered to be remanded for further proceedings by the Board limited to the question whether PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act."

Vacated and remanded.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

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No. 15,085

September Term, 1959.

Civil 1708–57

PACIFIC FAR EAST LINE, INC., APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES.

No. 15,086

UNITED STATES OF AMERICA, APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES.

Appeals from the United States District Court for the District of Columbia.

Before: EDGERTON, WILBUR E. MILLER and BASTIAN, *Circuit Judges.*

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the judgment of the District Court in the case appealed from herein is vacated, and that the case is remanded to the said District Court for further proceedings by the Federal Maritime Board limited to the question whether Pacific Far East Line's entry into the trade would be prejudicial to the objects and policy of the Merchant Marine Act of 1936.

For Circuit Judge EDGERTON.

Dated: FEBRUARY 4, 1960.

APPENDIX C

MERCHANT MARINE ACT, 1936

TITLE I—DECLARATION OF POLICY

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. [46 U.S.C., sec. 1101, 49 Stat. 1985]

* * * * *

SEC. 805. (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of the Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic inter-

coastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of

a misdemeanor. [46 U.S.C., sec. 1223, 49 Stat. 2012, 52 Stat. 963.]

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ADMINISTRATIVE PROCEDURE ACT

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHTS OF REVIEW

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. [5 U.S.C., sec. 1009]

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U.S. GOVERNMENT PRINTING OFFICE: 1960